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Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (Text with relevance for the EEA and Switzerland) - Progress Report

I. INTRODUCTION

On 13 December 2016, the Commission submitted its proposal to amend Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004. The proposal is based on Article 48 TFEU.

The general objective of the proposal is to continue the modernisation of EU social security coordination rules by making them clearer and fairer, and by improving their enforceability, thus contributing to the facilitation of free movement of persons within the EU. In particular, the proposal focuses on five areas:

- (i) unemployment benefits,
- (ii) long-term care benefits,
- (iii) access by economically inactive mobile citizens to certain social benefits and
- (iv) family benefits
- (v) applicable legislation for posted and sent workers and persons working in two or more Member States.

In line with the Interinstitutional Agreement on Better Law-Making, the Commission carried out an impact assessment (IA) of potential policy options which evaluated their economic, social, regulatory and overall efficiency and coherence with wider EU objectives. The IA covered the four areas of the proposal, but it did not extend to the proposals on strengthening the administrative rules on social security coordination concerning applicable legislation, especially for posted workers, which were either deemed to clarify existing obligations under the current Regulations or to be solely technical in nature. Before submitting its proposal, the Commission carried out extensive consultations of stakeholders, including Member States within the Administrative Commission and the social partners. Additionally, two public consultations were launched in December 2012 and in July 2015.

The proposed legal basis is Article 48 of the Treaty on the Functioning of the European Union, which requires that the European Parliament and the Council act in accordance with the ordinary legislative procedure.

The European Parliament has not yet delivered its opinion.

In line with the envisaged preamble to the amending Regulation, on 15 February, the Committee of Permanent Representatives approved an optional consultation of the European Economic and Social Committee (EESC). The EESC, as well as the Committee of the Regions have not yet delivered their opinion.

All delegations are considered to have maintained their general scrutiny reservations on the proposal. The Commission has affirmed its original proposal at this stage and maintained a scrutiny reservation on any changes thereto.

The numbering of the paragraphs (in Annex I and II) is in relation to the Commission proposal (doc. 15642/16).

II. THE COUNCIL'S WORK UNDER THE MALTESE PRESIDENCY

The Social Questions Working Party (SQWP) started examining the proposal on 30 January 2017 and discussed the file on ten occasions. It devoted three meetings to general comments and the related Impact Assessment (IA). A questionnaire was sent to the delegations on which a majority of Member States replied, the replies to the questionnaire have been discussed by the SQWP on 16 February. The summary of the IA discussions can be found in Annex III to this Report.

The Maltese Presidency addressed parts of the proposal concerning 'equal treatment and access by economically inactive mobile citizens to certain social benefits' and 'applicable legislation'. On the majority of provisions, substantive progress was registered. Nevertheless, some issues require further examination, due to their legal and technical complexity.

The main milestones of the Presidency's work on the file are the following:

1. EQUAL TREATMENT AND ACCESS BY ECONOMICALLY INACTIVE MOBILE CITIZENS TO CERTAIN SOCIAL BENEFITS

Limitations to the equal treatment as regards economically inactive mobile citizens to social benefits (Recitals 2, 2a (new), 5, 5-a (new), 5a, 5aa (new), 5b, 5c, 47, 48; Article 4, Article 4a (new) and Article 70(4a) (new)

Article 4 of Regulation (EC) No 883/2004 provides for equal treatment of persons within its personal scope with nationals of any Member State, in terms of benefits and obligations under their legislations. The Commission proposed clarifying in a new paragraph 2 that, in relation to access to social security benefits by economically inactive mobile EU citizens, the principle of equal treatment may be subject to the requirement to hold legal residence as set out in Directive 2004/38/EC. In its initial proposal, the Commission aimed at codifying the European Court of Justice (ECJ) cases C-308/14 European Commission v United Kingdom of Great Britain and Northern Ireland, C-140/12 Brey, and C-333/13 Dano.

The derogation from the fundamental principle of equal treatment and the codification of the existing case law by the ECJ was discussed thoroughly. The delegations considered that the Commission's proposal did not take into consideration all the developments in this area, and that in addition other case law should be taken into account, namely cases C-67/14 Alimanovic and C-299/14 Garcia-Nieto.

Delegations generally agree that the jurisprudence of the Court of Justice permits (but does not require) Member States to make access to special non-contributory cash benefits which also constitute social assistance for the purposes of Directive 2004/38/EC subject to the limitations and the conditions set out in Article 24 of that Directive. However, there remain differences of views on the approach to codification.

Two groups of delegations with a different interpretation approach have emerged: some delegations requested to leave untouched the fundamental principle of equal treatment under Article 4 and providing for a codification in individual provisions, while other delegations have advocated introducing the codification directly into Article 4, as proposed by the Commission. The latter group requested further provisions to be introduced into Article 4 given that the Brey and Dano case law and the Alimanovic and Garcia-Nieto case law covered different categories of persons falling under Directive 2004/38/EC. These four judgments have been codified by the introduction of a new paragraph 4a under Article 70 of Regulation (EC) No 883/2004, since they all concern special non-contributory cash benefits.

One of the most contentious issues on which delegations could not reach agreement concerned the codification of the case C-308/14 - Commission vs. UK. In particular, the discussions concerned whether this case applies to all non-contributory social security benefits, or whether it should apply restrictively to family benefits, such as the benefits at issue in that case, with a codification to include a new paragraph in article 67 in Title III Chapter 8 of Regulation (EC) No 883/2004 rather than a provision in Title I.

During the last working party, a bigger number of delegations supported the option that the codification of this case law should cover all non-contributory social security benefits, and not just family benefits. The Presidency has therefore introduced a new Article 4a aiming at codifying the case C-308/14 - Commission vs. UK.

While Article 70(4a)¹ as proposed by the Presidency seems to be acceptable for the majority of delegations, the issue of codifying the case C-308/14 - Commission vs. UK will require further work at the expert level ('non-contributory social security benefits covered by Article 3' left in brackets, see Annex I, Recital 5a and Article 4a(1)).

¹ Article 70(4a) has been renumbered and relates to the former Article 70(5) in the latest Presidency compromise text.

Based on the discussions, the Presidency has in addition clarified, in new Article 4a(2) and new Recital 5aa, that the limitations should also apply to persons covered by the Regulation other than EU citizens, namely stateless persons and refugees as well as their family members and their survivors who do not fulfil the conditions of legal residence in accordance with other relevant Union law provisions. This is based on a broad agreement in the Working Party that such persons should not be treated in a more favourable way than Union citizens.

The Presidency is also suggesting adding a new Recital 5-a (in relation to Article 70(4a) codifying the Brey, Dano, Alimanovic and Garcia-Nieto judgments), Recital 5a (in relation to Article 4a codifying the Commission v UK judgment), new Recital 5aa (in relation to the clarification of ensuring that nationals of a Member State are not treated less favourably than other persons covered by the Regulation in a comparable situation). Based on the outcome of the discussions which took place at expert level, the Presidency is proposing to delete Recital 5b on comprehensive sickness insurance, to delete Recital 5c referring to the Charter of Fundamental Rights and to merge Recitals 47 and 48 into one (Recital 47). The Working Party reached a broad agreement on this approach.

2. APPLICABLE LEGISLATION

(a) Flight crew or cabin crew members

(i) Recital 18b and Article 11(5) of Regulation 883/2004

Article 11(5) of Regulation 883/2004 determines that the activity of flight or cabin crew members shall be deemed to be performed in the MS where the home base is situated. The Commission proposal updates Article 11(5) and Recital 18b to bring it in line with the new definition of "home base" in Commission Regulation (EU) No 965/2012.

No major issues arose at the Working Party regarding this update, however a few MS questioned whether it was practical to determine the activity pursued as "exclusively" in the Member State of home base. Since "exclusively" does not derive directly from aligning the definitions, the Presidency proposed removing it. No Member State voiced opposition to this. As the Commission pointed out, irrespective of whether or not the word "exclusively" appears in the text, Article 11(5) provides a conflict of law rule to determine a single applicable legislation, therefore only one homebase can apply.

The Presidency considers that a broad agreement has been reached on Article 11(5) and Recital 18b of Regulation 883/2004.

(ii) Article 15(2) of Regulation 987/2009

The Commission proposed adding, in Article 15(2), a reference to Article 11(5) in order to provide for the issuance of a Portable Document A1 (PDA1) to flight crew and cabin crew members referred to in Article 11(5) of Regulation (EC) No 883/2004.

There was a broad agreement in the Working Party concerning this provision as proposed by the Commission.

(b) Special rules on applicable legislation

(i) Article 12 of Regulation 883/2004

Article 12 determines which Member State's legislation is applicable to employed or self-employed persons, who pursue an activity in a Member State and are sent or go to another Member State to perform work there for a maximum of 24 months. The Commission proposed updating the terminology used, so that a "posted worker" in the meaning of Regulation (EC) No 883/2004 would be aligned with a "posted worker" in the meaning of Directive 96/71/EC concerning the posting of workers, and therefore distinguishing between "posted" and "sent" workers in order to enhance legal clarity. Additionally, the proposal extends the ban on replacement of posted workers to self-employed persons.

There was a broad agreement in the Working Party that the proposed distinction between "posted" and "sent" workers would be difficult to implement in practice and that the costs of this change would outweigh the minimal benefits. Furthermore, whereas certain MS were in favour of a broad interpretation of replacement, others opted for a more narrow approach.

In order to improve clarity on the terminology used under the Posting Directive and the Regulation on the coordination of social security, the Presidency proposed to replace the term "posted" worker with the term "sent" worker to refer to both employed and self-employed persons. This way the term 'posted' will no longer be of relevance for the determination of applicable legislation under the Regulation and only mean a posted worker under the Directive 96/71/EC.

In order to accommodate the two diverging approaches on the interpretation of replacement, the Presidency kept a broader approach in Article 12(2) which recognised that the prohibition on replacement could be violated even in cases when the person replacing a worker or self-employed person is covered by the legislation of a different Member State. In addition the Presidency introduced a new Article 12(2a) to allow for exceptions from the replacement ban. The new Article 12(2a) permits a limited derogation from the general prohibition on replacement of sent workers/self-employed persons so long as the overall time of work or activity does not exceed 24 months. At the last Working Party the Presidency observed a general support for its proposed wording. The last modifications to new Article 12(2a) intend to make the wording more precise, in line with delegations' support for the overall approach in this paragraph.

The Presidency considers that a broad agreement has been reached on Article 12 of Regulation [883/2004](#).

(ii) Article 14 of Regulation [987/2009](#): Details relating to Articles 12 and 13 of Regulation [883/2004](#)

Article 14(1) provides for an obligation of the worker to be previously affiliated to the social security system of the Member State where his or her employer is established. The Commission proposed replacing the Member State of the establishment of the employer by the sending Member State and aligning the first paragraph with its proposal on Article 12 (sent/posted and link to Regulation [96/71/EC](#)).

Article 14(5a) clarifies that, in case of an activity in more Member States, an employee should be subject to the legislation of the Member State, where the employer or undertaking's registered office or place of business is situated, only as long as the employer carries out substantial activity in that Member State. Otherwise the employee shall be covered by the legislation of the Member State where the employer's centre of interest or activities is situated.

In Article 14(12), an EU national who resides in a third country and who works as an employed or self-employed person in two or more Member States, and by virtue of the national legislation of those Member States, is subject to the legislation of those States, would be subject only to the social security legislation of the Member State of the registered office or place of business or the centre of interest of his or her activity, as if it was its state of residence.

In the last SQWP meeting, the Presidency presented two options for paragraph 1 as well as for paragraph 5a. With regards to Article 14(1), a large number of delegations preferred option 1, namely 'the sending Member State in accordance with Title II of the basic Regulation'. A smaller number of delegations preferred option 2, namely 'the first Member State referred to in Article 12(1) of the basic Regulation', whereas a third group of delegations stated that they would prefer to maintain the status quo, i.e. the Member State where the employer is established. The Presidency is therefore suggesting to proceed on the basis of option 1, but is putting the text in brackets as discussions may continue on this issue (See Annex II, Article 14(1)).

Further discussions may also be required under this Article 14(1) with regards to the proposals put forward by some delegations, based on the Report of the Ad Hoc Group on Posting issues (May 2016), which was set up by the Administrative Commission at its 341st meeting on 9 December 2014, that Article 14(1) should contain a condition of ‘prior affiliation’ to the legislation of the sending Member State for at least a period of three months prior to becoming eligible for being sent under Article 12. Those delegations are also making proposals relating to a ‘replacement ban’, meaning that where a worker has ended a period during which he was sent under Article 12(1), no new period for the same worker and the same Member State can start until at least three months have elapsed from the end of the previous period. These delegations are requesting that this also applies if the worker had pursued an activity in the Member State of employment during which he/she was covered by the legislation of a different Member State in accordance with Article 13 of Regulation (EC) No 883/2004.

Similarly, out of the two options proposed by the Presidency under paragraph 5a, a large number of delegations were in favour of the first option, namely ‘the Member State where the undertaking carries out the major part of its activities in terms of the duration of the activities pursued and/or number of services rendered’ over option 2, namely ‘the Member State of residence of the employed person concerned’². However, another group of delegations are concerned that the change to Article 14(5a) may create unnecessary administrative burdens on the institutions, and were against the introduction of the requirement of substantial activities in this Article, thus advocating the status quo.

² The Commission expressed significant reservations about such an approach that it would mark a regression on earlier amendments to the Regulations and could facilitate opportunistic behaviour.

Some delegations stated that they may be able to accept the inclusion of substantial activities if there was a specific exclusion for the international transport sector. The Presidency is therefore proposing to keep the first option in brackets and continuing the discussions on whether the requirement of substantial activities should apply for both Articles 12 and 13, and if so, in which Member State the undertaking should be considered to have its registered or place of business in case it does not perform substantial activities in the Member State where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out (see Annex II, Article 14(5a)).

As regards Article 14(12), a broad agreement has been reached on determining the applicable legislation based on the fiction of the place of residence being considered in the Member State where an EU national residing outside the EU pursues the major part of his activities in terms of working time, rather than of the Member State of the registered office or place of business or the centre of interest of his or her activity, as proposed by the Commission.

(iii) Article 16 of Regulation 987/2009: Procedure for the application of Article 13 of the basic Regulation

Article 16 regards the procedure for determining applicable legislation in the case of employment in two or more Member States. The Commission proposed, in paragraphs 1 and 5, that an employer can initiate the procedure on behalf of its employees and that the employer shall be notified of the decision taken as to which social security legislation shall apply. The institution in which the employer is situated shall also be informed of the decision. If the institution of the place of residence determines that the legislation of another Member State applies, the existing procedure comprising first a provisional determination becomes definitive within two months, unless other institution concerned contests that decision within that period.

Following detailed discussions and fine-tuning, there has been a broad agreement on the whole Article, as it resulted from the work of the Working Party.

(c) Obligation of competent authorities (Article 75a of Regulation 883/2004)

The Commission proposed moving the existing obligation contained in Article 89(3) of Regulation (EC) No 987/2009 to a new Article in Regulation (EC) No 883/2004 to give greater prominence to this provision whereby competent institutions have to ensure that their institutions are aware of and comply with the relevant provisions relating to coordination, including decisions of the Administrative Commission. An obligation has been also introduced to promote cooperation between competent institutions and labour inspectorates at national level.

There was a broad agreement in the Working Party on the text of this provision, as it has resulted from its discussions.

(d) Implementing acts (Articles 72(ea) (new), 76a and 76b (new) of Regulation 883/2004)

The Commission proposed inserting Article 76a to empower the European Commission to adopt implementing acts in accordance with Article 291 TFEU in order to ensure uniform conditions for the application of the special rules contained in Articles 12 and 13. The Commission also proposed that the Committee within the meaning of Regulation (EU) No 182/2011 should be the Administrative Commission (AC) referred to under Title IV of Regulation 883/2004.

The Presidency has proposed deleting, *inter alia*, the reference to ‘the determination of situations in which the document shall be issued’, as it considered such situations are established in Regulation (EC) No 987/2009. It also proposed transforming paragraph 3 in a separate Article 76b, while making away with the double role of the AC, taking into account the practical difficulties related thereto and the specific role of the comitology committee under Article 5 of Regulation (EU) No 182/2011.

The Working Party has also held a thorough discussion on the role of the AC, its input in the work of the Commission and the relation between its non-binding decisions and the legally binding implementing acts. In order to reinforce the expert role of the Member States, a no-opinion clause as made possible under third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 was introduced in Article 76b(3). Similarly, the AC would be asked to provide opinions prior to the Commission adopting an implementing act without modifying the procedure for the adoption of such acts; this text having been agreed in principle in the last Working Party, the Presidency suggest moving it from Article 76a(3) to a new paragraph (ea) under Article 72 concerning the tasks of the AC and slightly adapting its wording.

The Presidency considers that the Working Party has reached a broad agreement on the principles that underline Articles 72(ea), 76a and 76b of Regulation 883/2004.

(e) Definition of fraud (Article 1 of Regulation 987/2009)

The Commission has amended Article 1 to include a new definition of "fraud" linked to its proposal in Article 5(2).

The Presidency considers that a broad agreement has been reached on this Article.

(f) Legal value of documents and supporting evidence issued in another Member State (Article 5 and Article 19a (new) of Regulation 987/2009)

In Article 5, the Commission proposed several amendments concerning the validity of issued documents and in relation to the contesting procedure. In particular, a requirement has been introduced whereby a declaratory document issued by an institution should only be valid where all mandatory information has been completed. Furthermore, a deadline of 25 working days has been proposed for the issuing institutions to review the grounds for issuing a document and where necessary to rectify or withdraw with retroactive effect, and of two working days in case of urgency. These deadlines are inspired by the Posting Enforcement Directive 2014/67/EU.

Following an in-depth analysis of the article, the Presidency suggested, on the basis of a proposal by one delegation which was supported by other delegations, to split the text of Article 5 into two parts; the general part on the validity of the issued documents remains under Article 5, while the part on the cooperation in case of doubts about the validity of issued documents concerning the applicable legislation procedure is moved to Article 19a under Title II of the Regulation (EC) No 987/2009.

In the last WP, there was a broad agreement to follow this approach. There was a broad agreement reached on Article 5, with the exception of one sentence at the end of paragraph one concerning the requirement to fill in all compulsory fields in the form, so that the document is considered to be valid. The relevant text has been put in brackets (see Annex II, Article 5(1)) and needs further examination given that currently Portable Documents do not have such compulsory fields indicated, and its relation to Article 76a on implementing acts.

With regards to Article 19a, the Working Party reached a broad agreement on this Article. The deadlines for cooperation between the institutions have been prolonged to 30 working days under normal procedures, and for the urgency procedure to ten working days. Nonetheless, there is still one open issue: the Presidency is proposing to maintain the principle of retroactive effect of the withdrawal or rectification which seems to have been supported by a bigger number of delegations in the last Working Party. This still requires further examination, as there is a substantial group of delegations opposing it, in particular referring to the administrative complications of retroactive withdrawal and also to the impossibility of knowing about wrong postings in some cases of replacement for the issuing institution. The relevant sentence has therefore been put in brackets (see Annex II, Article 19a(2)).

Another open issue concerns the effect of opinions of the Conciliation Board of the AC. A group of delegations submitted a proposal advocating that the competent authorities who voluntarily request the conciliation of the AC should commit to comply with the decisions of the AC under the conciliation procedure, and if necessary withdraw or declare invalid the documents issued. This point was raised in relation to the ECJ rulings whereby portable documents can be withdrawn only by the issuing institution which leads to many practical difficulties on the side of the requesting institutions.

(g) Article 73 of Regulation 987/2009: Settlement of benefits in cash and in kind and contributions unduly provided or paid

The proposal by the Commission under Article 73 concerns, in paragraph 1 and 2, the application of the offsetting procedure to settlement of claims to cases resulting from a retroactive change of the applicable legislation. A new paragraph 4 has been added to ensure that national time limits cannot be the reason for refusing the settlement of claims between institutions. Under paragraph 5, the Commission proposes to introduce the 5 years period for under this Article 73 counting backwards from the date of the launch of the procedure for resolving disputes between Member States referred to in Articles 5(2) or 6(3).

Due to the great technical complexity and the content, it was decided to postpone the debate on Article 73 to a later stage, when Title IV of Regulation (EC) No 987/2009 would be discussed in the SQWP. Delegations also agreed to already that this issue needs further discussions among experts.

III. CONCLUSIONS

The Maltese Presidency invested considerable efforts to progress as much as possible on the two chapters concerned. The Presidency considers that on a big number of provisions a broad agreement has been reached by the Working Party.

However, there is still a need for further discussions at the technical level on the following questions:

- 1) **Article 4a of Regulation (EC) No 883/2004 and the related Recital 5a:** which benefits should the codification of the case C-308/14 European Commission v United Kingdom of Great Britain and Northern Ireland cover?

- 2) **Article 5(1) of Regulation (EC) No 987/2009:** should the documents issued be only valid if all sections indicated as compulsory are filled in?
- 3) **Article 5(4) of Regulation (EC) No 987/2009:** should it be included in this Article that competent authorities should commit to comply with the opinion of the Conciliation Board, which is a committee of the Administrative Commission, and if necessary withdraw or declare invalid the documents issued if the opinion of the Conciliation Board states so?
- 4) **Article 14(1) of Regulation (EC) No 987/2009:** should this Article be amended as proposed in option 1 by the Presidency, and should the new conditions of ‘prior affiliation’ and ‘replacement ban’ (both of three months) be introduced?
- 5) **Article 14(5a) of Regulation (EC) No 987/2009:** should the requirement of ‘substantial activities’ be introduced in this Article, to cover both Articles 12 and 13 (with the possible exclusion of the international transport sector), and if so, in which Member State the undertaking should be considered to have its registered or place of business in case it does not perform substantial activities in the Member State where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out?
- 6) **Article 19a(2) of Regulation (EC) No 987/2009:** should a withdrawal or rectification under this Article always have retroactive effect, unless otherwise agreed by the Member States concerned under Article 16 of the basic Regulation, taking into consideration the interest of the person/s concerned?

The Presidency considers that the outcome of its work marks an important step in clarifying the relevant provisions of the two chapters and represents a solid basis for continuing the discussion on the entire proposal, in order to finalise the work in the Council as soon as possible.

Provisions in proposal related to: *Equal treatment and access to social benefits***Regulation (EC) No. 883/2004****Recital 2**

The Treaty does not provide powers other than those of Article 308 to take appropriate measures within the field of social security for persons other than employed persons.

Recital 2a

Articles 45 and 48 of the Treaty of the Functioning of the European Union ensure free movement of workers entailing the abolition of any discrimination based on nationality and provide for the adoption of the necessary measures in the field of social security to secure that freedom. In addition, under Article 21 of the Treaty of the Functioning of the European Union, every Union citizen has the right to move and reside freely within the territory of the Member States subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

Recital 5

It is necessary, within the framework of such coordination, to guarantee within the Union equality of treatment under the different national legislations for the persons concerned.

Recital 5(-a)

In applying the general principle of equal treatment provided for in this Regulation, the Court has held in its judgments in cases C-140/12 Brey, C-333/13 Dano, C-67/14 Alimanovic and C-299/14 Garcia-Nieto, that equal treatment may, as regards the access to special non-contributory cash benefits, which also constitute social assistance within the meaning of Directive 2004/38/EC, be subject to the limitations and the conditions set out in Article 24 of that Directive. In order to improve legal clarity for citizens and institutions, these case laws should be codified. Limitations to equal treatment should respect Union law, including the principle of proportionality as interpreted by the Court.

Recital 5a

The Court of Justice has held in its judgment in case C-308/14 European Commission v United Kingdom of Great Britain and Northern Ireland that Member States may, in conformity with Union law, including the principle of proportionality, make the access of persons covered by Article 11(3)(e) of this Regulation to [non-contributory social security benefits covered by Article 3]³, subject to the condition that those persons have a legal right of residence in accordance with Directive 2004/38/EC. As stated by the Court, the verification of the legal right of residence should be carried out in accordance with the requirements of Directive 2004/38/EC. In order to improve legal clarity for citizens and institutions, this case law should be codified.

Recital 5aa

It is necessary to ensure that nationals of a Member State are not treated less favourably than other persons covered by this Regulation in a comparable situation. The limitations to equal treatment introduced in this Regulation should therefore, without prejudice to rights of equal treatment provided for in other Union law provisions, also apply *mutatis mutandis* to the latter group.

³ See Report, Section II(1).

Recital 5b

[...]

Recital 5c

[...]

Recital 47

This Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights.

Recital 48

[...]

Article 4

Equality of Treatment

Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.

Article 4a

Limitations to equality of treatment for persons not having a legal right of residence under Union law

1. By derogation from Article 4, a Member State whose legislation is applicable on the basis of Article 11(3)(e) of this Regulation may, in conformity with Union law, provide that access to [non-contributory social security benefits covered by Article 3]⁴ be subject to the condition of having a legal right of residence in accordance with Directive 2004/38/EC.
2. Member States may apply the limitations referred to in paragraph 1 also *mutatis mutandis* to stateless persons and refugees as well as to the members of their families and to their survivors who do not fulfil the conditions of legal residence or stay in accordance with other relevant Union law provisions.

Article 70

General provision

- 4a. A Member State may, in conformity with Union law, derogate from Article 4 and provide that access to the benefits referred to in paragraph 2 of this Article, which also constitute social assistance within the meaning of Directive 2004/38/EC, is conditional upon the person claiming these benefits fulfilling the conditions for equal treatment under Article 24 of that Directive.
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⁴ See Report, Section II(1).

Provisions in proposal related to: *Applicable Legislation***Regulation (EC) No. 883/2004****Recital 18b**

In Annex III, Subpart FTL to Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and the Council, as amended by Commission Regulation (EU) No 83/2014/EU of 29 January 2014 amending Regulation (EU) No 965/2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and the Council, the concept of ‘home base’ for flight crew and cabin crew members is defined as the location, assigned by the operator to the crew member, from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal circumstances, the operator is not responsible for the accommodation of the crew member concerned.

Article 11**General rules**

5. An activity as a flight crew or cabin crew member performing air passenger or freight services shall be deemed to be an activity pursued in the Member State where the home base, as defined in Annex III, Subpart FTL to Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and the Council as amended by Commission Regulation (EU) No 83/2014/EU of 29 January 2014, is located.

Article 12

Special rules

1. A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there, and who is sent by that employer to another Member State to perform work on that employer's behalf, shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that the person is not replacing another previously sent employed person covered by this paragraph or a self-employed person covered by paragraph 2.

2. A person who normally pursues an activity as a self-employed person in a Member State who goes to pursue a similar activity in another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed 24 months and that the person is not replacing another previously sent employed person covered by paragraph 1 or a self-employed person covered by this paragraph.
 - 2a. Where an employed person covered by paragraph 1 or a self-employed person covered by paragraph 2 does not complete the work or activity and is replaced by another person, the other person shall continue to be subject to the legislation of the Member State from which he/she is sent or in which he/she normally pursues an activity as a self-employed person provided that the total duration of work or activity by all persons in the second Member State does not exceed 24 months.

Article 72

Tasks of the Administrative Commission

- (ea) provide opinions to the European Commission on the draft implementing acts referred to in Article 76a prior to their adoption in accordance with the procedure referred to in that Article, and make any relevant proposals to the European Commission for the revision of the said implementing acts;

Article 75a

Obligation of competent authorities

1. The competent authorities shall ensure that their institutions are aware of and apply all provisions, legislative or otherwise, including the decisions of the Administrative Commission, in the areas covered by and within the terms of this Regulation and the implementing Regulation.
2. In order to ensure the correct determination of the applicable legislation, the competent authorities shall promote, where appropriate, the cooperation between their institutions and other relevant bodies, including labour inspectorates, in their Member States.

Article 76a

Power to adopt implementing acts

1. The Commission shall adopt implementing acts to specify the procedure, including where appropriate, time limits, to be followed in order to ensure the implementation under uniform conditions of Articles 12 and 13 of this Regulation. Those implementing acts shall establish standard procedures for:
 - the issuance, the format and the contents of a portable document certifying the social security legislation which applies to the holder,

- the elements to be verified before the document can be issued, withdrawn or rectified,
 - the withdrawal or rectification of the document by the issuing institution when its accuracy and validity is contested by the competent institution of the Member State where the activity is carried out on the basis of supporting information, and such contestation is founded.
2. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 76b(2) of this Regulation.
 3. [...]

Article 76b

Examination procedure

1. The Commission shall be assisted by a committee. The Committee is a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this Article, Article 5 of Regulation (EU) No 182/2011 shall apply.
3. Where the committee delivers no opinion, the European Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.

Regulation 987/2009

Article 1

Definitions

2(ea) ‘fraud’ means any intentional act or intentional omission to act, in order to obtain or receive social security benefits or to avoid paying social security contributions, contrary to the law of the Member State(s) concerned, the basic Regulation, or this Regulation;

Article 5

Legal value of documents and supporting evidence issued in another Member State

1. Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of the basic Regulation and of the implementing Regulation, and supporting evidence on the basis of which the documents have been issued, shall be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued. [Such documents shall only be valid if all sections indicated as compulsory are filled in] ⁵.
2. Without prejudice to Article 19a, where there is doubt about the validity of a document or the accuracy of the facts on which the document is based, the institution of the Member State that receives the document shall ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal or rectification of that document. The issuing institution shall reconsider the grounds for issuing the document and, if necessary, withdraw or rectify it.
3. Where there is doubt about the information provided by the person/s concerned, the validity of a document or supporting evidence or the accuracy of the facts on which the document is based, any institution concerned shall, insofar as this is possible, at the request of the competent institution, proceed to the necessary verification of this information or document.

⁵ See Report, Section II(2)(f).

4. Where no agreement is reached between the institutions concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than one month following the date on which the institution that received the document submitted its request. The Administrative Commission shall endeavour to reconcile the points of view within six months of the date on which the matter was brought before it.

Article 14

Details relating to Articles 12 and 13 of the basic Regulation

1. For the purposes of the application of Article 12(1) of the basic Regulation, a ‘person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is sent by that employer to another Member State’ shall include a person who is recruited with a view to being sent to another Member State, provided that before the start of his employment, the person concerned is already subject to the legislation of [the sending Member State in accordance with Title II of the basic Regulation]⁶.

- 5a. For the purpose of the application of Title II of the basic Regulation, ‘registered office or place of business’ shall refer to the registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out, [provided the undertaking performs a substantial activity in that Member State. Otherwise, it shall be deemed to be situated in the Member State where the undertaking carries out the major part of its activities in terms of the duration of the activities pursued and/or number of services rendered]⁷.

⁶ See Report, Section II(2)(b)(ii).

⁷ See Report, Section II(2)(b)(ii).

12. If a person who resides outside the territory of the Union pursues his/her activities as an employed or self-employed person in two or more Member States and if this person, by virtue of the national legislation of those Member States, is subject to the legislation of those States, the provisions of the basic Regulation and the implementing Regulation on the determination of the applicable legislation shall apply *mutatis mutandis* subject to the provision that his or her residence shall be deemed to be in the Member State where the person pursues the major part of his/her activities in terms of working time within the territory of the Union.

Article 15

Procedures for the application of Article 11(3)(b) and (d), Article 11(4), Article 11(5) and Article 12 of the basic Regulation (on the provision of information to the institutions concerned)

2. Paragraph 1 shall apply *mutatis mutandis* to persons covered by Article 11(3)(d) and Article 11(5) of the basic Regulation.

Article 16

Procedure for the application of Article 13 of the basic Regulation

1. A person who pursues activities in two or more Member States shall inform the institution designated by the competent authority of the Member State of residence thereof. This information may also be provided by the employer on the person's behalf.
2. The designated institution of the place of residence shall without delay determine the legislation applicable to the person concerned, having regard to Article 13 of the basic Regulation and Article 14 of the implementing Regulation. If this institution determines that the legislation of the Member State where this institution is situated applies, it shall inform the designated institutions of each Member State in which an activity is pursued and/or in which the employer is situated of its determination of the applicable legislation.

3. If the designated institution of the place of residence determines that the legislation of another Member State applies, that determination shall be provisional, and this institution shall without delay inform the designated institutions of each Member State in which an activity is pursued and/or in which the employer is situated of this provisional determination of the applicable legislation. The provisional determination shall become definitive two months after the institutions designated by the competent authorities of the Member States concerned being informed of it, unless at least one of these institutions informs the designated institution of the place of residence by the end of this two month period that it cannot yet accept the provisional determination or that it takes a different view on this.
5. The competent institution of the Member State whose legislation is determined to be applicable either provisionally or definitively shall without delay inform the person concerned and his/her employer of the determination.

Article 19

Provision of information to persons concerned and employers

3. Whenever an institution is asked to issue the attestation referred to above, it shall carry out a proper assessment of the facts relevant for the application of the rules set out in Title II of the basic Regulation and confirm that the information contained in the attestation is correct.

Article 19a

Cooperation in case of doubts about the validity of issued documents concerning the applicable legislation

1. Where there is doubt about the validity of a document showing the position of the person for the purposes of the applicable legislation or the accuracy of the facts on which the document is based, the institution of the Member State that receives the document shall ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal or rectification of that document. The requesting institution shall substantiate its request and provide relevant supporting documentation that gave rise to the request.

2. When receiving such a request, the issuing institution shall reconsider the grounds for issuing the document and, where an error is detected, withdraw it or rectify it within 30 working days from the receipt of the request. [The withdrawal or rectification shall have retroactive effect, unless otherwise agreed by the Member States concerned in terms of Article 16 of the basic Regulation, taking into consideration the interest of the person/s concerned.]⁸ Where the issuing institution considers that, on the basis of the available evidence, there is no doubt that the applicant of the document has committed fraud, it shall withdraw or rectify the document without delay and with retroactive effect.
3. If the issuing institution, having reconsidered the grounds for issuing the document is unable to detect any error it shall forward to the requesting institution all available evidence within 30 working days from the receipt of the request. In urgent cases, where the reasons for urgency have been clearly indicated and substantiated in the request, this shall be done within ten working days from the receipt of the request, notwithstanding that the issuing institution may not have completed its deliberations pursuant to subparagraph (a) above.
4. Where the requesting institution having received the available evidence continues to have doubts about the validity of a document or the accuracy of the facts on which the particulars contained therein are based or that the information upon which the document was issued is not correct, it may submit evidence to that effect and make a further request for clarification and where appropriate the withdrawal or rectification of that document by the issuing institution in accordance with the procedure and timeframes set out above.
5. If the doubts of the receiving institution persist and no agreement is reached between the institutions concerned, Article 5(4) applies accordingly.

⁸ See Report, Section II(2)(f)

Article 73

Settlement of benefits in cash and in kind and contributions unduly provided or paid in case of provisional award of benefits or retroactive change of the applicable legislation

The SQWP decided to postpone the debate on Article 73 to when TITLE IV of the implementing Regulation will be discussed.

Summary of the Working Party discussions on the Impact Assessment (IA)

In general, an overwhelming majority of delegations felt that the **policy context, legal basis** and **problem definition** were clearly or to some extent explained and correctly identified in the IA. However, most delegations also expressed concern about the lack of IA on amendments concerning the applicable legislation and posting, which they deemed substantial rather than technical in nature. The lack of sufficient justification on the policy context and the legal basis for a derogation from the principle of equal treatment was a concern for several delegations as well. Concern was expressed about whether the legal basis covered the proposed amendments to long-term care benefits. Furthermore, several delegations thought that definitions were not always clearly set out, specifically the definition of long-term care benefits and of economically inactive persons. Some delegations were not satisfied with the conclusions drawn in the IA on family benefits, as they did not agree with the statistical analysis reported, and thought that the indexation of family benefits would have been an option which should have been included in the proposal. This raised opposition by a large group of the other delegations. The vast majority of delegations agreed that the principles of **subsidiarity and proportionality** are clearly established in the IA.

A group of delegations felt that the **policy objectives, the policy options** presented in the IA and the conclusions drawn from the analysis were not always coherent; the IA seems to draw either no conclusions or different conclusions to what the proposed policy option is, especially on family benefits, the extension of exportability of unemployment benefits and on derogation from equal treatment. Some delegations further questioned whether the policy choices in the proposal were supported by the social partners and other stakeholders, which, in their view, does not seem to be the case based on the IA. Other delegations were satisfied with the policy objectives and policy options presented.

Most delegations deemed the analysis of **impacts** for each option presented in the IA clear to a some extent. Many delegations stressed that the **data** used had gaps and was outdated in many cases, compromising the analysis and the conclusions drawn. Many delegations lacked clear analysis backed by data on the extension of export of unemployment benefits. Some other delegations thought that Switzerland should have been more broadly included in the IA, specifically regarding unemployment benefits of cross-border workers. A group of delegations thought that the economic impact analysis on SMEs was not sufficiently in-depth, whereas others were satisfied with the assessment. As for the social impacts, most delegations were satisfied with the assessment only to some extent. Furthermore, most delegations judged that the assessment of environmental impacts and of impacts on consumers was adequate and that the analysis of impact on competition was satisfying or satisfying to some extent. An overwhelming majority of delegations thought that the impact on fundamental rights has been satisfactorily analysed.

Most delegations responded that the impact on **regulatory costs** was assessed only to some extent. They noted, particularly regarding unemployment benefits of cross-border workers, that only limited data was used for analysis and only some impacts were assessed in this regard.

Most delegations deemed that the comments and **recommendations of the Regulatory Scrutiny Board (RSB)** have been taken into account or taken into account to some extent. Some delegations saw a deficiency in the IA's consideration of the RSB's call for more quantitative analysis, other delegations thought that the IA was too long.

All delegations responding to the question thought that the appropriate **methodology** was applied and that the limitations and uncertainties clearly explained. While delegations were generally satisfied or satisfied to some extent with how the IA outlined **monitoring** and evaluation arrangements and with the proposed indicators, most responding delegations indicated that the IA did not contain sufficient information on the impact of the **transposition deadline**.